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In the

Supreme Court of the United States

October Term, 1959

No. 43

HARRY R. THOMAS, EXECUTOR OF THE ESTATE OF CRANDAL MACKEY, DECEASED,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Petition for a Writ of Certiorari to the Circuit Court of Arlington County, Virginia

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

On February 25, 1960, Petitioner filed in this Court his petition and appendix, in the requisite number of copies, together with a certified copy of the record from the Circuit Court of Arlington County, Virginia. Two copies of the petition and appendix were received in the mail by counsel for Respondent on February 26, 1960.

The "Statement of the Case" set out on pages 3, 4 and 5 of the petition fairly presents the prior proceedings and the facts of the case from its inception through the denial of a writ of error by the Supreme Court of Appeals of Virginia on November 27, 1959, hence repetition here is unnecessary.

QUESTION PRESENTED

Was the Two Hundred Sixty-three Thousand One Hundred ($263,100.00) Dollars of United States currency, commonly known as paper money, located in a safe deposit box in the name of Crandal Mackey, the testator, in the Second National Bank in the District of Columbia, intangible personal property, with the result that the assessment and collection by the Commonwealth of Virginia of an inheritance or succession tax on this asset of the estate of a domiciliary of Virginia does not constitute a taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

The United States Currency in Question Was Intangible Personal Property and Subject to the Virginia Inheritance Tax

The principal statute of the Commonwealth of Virginia pertinent to the instant case is Section 58-152 of the Code of Virginia, 1950, which reads, in part:

> "58-152. State inheritance taxes as hereinafter prescribed, are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this Commonwealth, real, personal and mixed, and any interest therein, which shall pass:
>
> "(1) By will or by the laws regulating descents and distributions; * * *."

As interpreted by the Supreme Court of Appeals of Virginia this Code section

> "* * * lays the inheritance tax on the shares of beneficiaries in property 'within the jurisdiction of this Commonwealth.' Property may be in this jurisdiction either actually or constructively. It is here actually when it is physically present. It is here constructively

when it is intangible property which has not acquired a tax situs elsewhere by reason of its use and its owner is domiciled here." *Commonwealth* v. *Morris*, 196 Va. 868, 877, 86 S. E. (2d) 135.

The Code of Virginia further prescribes that all money is, for tax purposes, "intangible personal property." Section 58-408 of the Code reads in part:

> "§ 58-408. (1) All money, except money which is otherwise taxed, on deposit with any bank or other corporation or firm or person doing a banking business,
>
> * * *
>
> "(4) Money in the possession or under the control of the owner, whether such money be actually in or out of this State and belonging to a resident of this State,
>
> * * *
>
> "Shall be deemed to be intangible personal property."

It is the contention of Respondent that currency (paper money), such as that found in the safe deposit box in the Second National Bank in the District of Columbia, is in essence an obligation or promise to pay a sum certain upon presentation to the issuer—the United States of America. It is evidence of a debt owed by the United States to the bearer of the note, certificate or bill. At the present, paper currency is issued in the form of (1) Gold Certificates, issued only to Federal Reserve banks against credits with the Treasurer of the United States and not appearing in circulation; (2) Silver Certificates, issued by the Treasurer against any standard silver dollars, silver, or silver bullion held in the Treasury against which silver certificates are not already outstanding; (3) United States Notes and (4) Federal Reserve Notes. The Silver Certificates and Federal Reserve Notes constitute the principal types of paper currency in circulation.

Examination of the face of a Silver Certificate, issued in denominations of one dollar, five dollars and ten dollars, discloses that the certificate recites: "THIS CERTIFIES THAT THERE IS ON DEPOSIT IN THE TREASURY OF THE UNITED STAES OF AMERICA ..... DOLLARS IN SILVER PAYABLE TO THE BEARER ON DEMAND." Similarly, a Federal Reserve Note recites: "THE UNITED STATES OF AMERICA WILL PAY TO THE BEARER ON DEMAND ..... DOLLARS." This latter note further recites on its face: "THIS NOTE IS LEGAL TENDER FOR ALL DEBTS, PUBLIC AND PRIVATE, AND IS REDEEMABLE IN LAWFUL MONEY AT THE UNITED STATES TREASURY, OR AT ANY FEDERAL RESERVE BANK."

It follows that the Two Hundred Sixty-three Thousand One Hundred ($263,100.00) Dollars in United States currency "commonly known as paper money" (Petition, App. p. 8a) was not gold or silver bullion, nor was it gold or silver coin, but was in fact a number of pieces of engraved paper in the form of notes or promises to pay "in silver" or "in lawful money" upon demand. This paper currency is in its essence only an evidence of debt.

In *Blodgett* v. *Silberman*, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410, relied on so heavily by Petitioner to support his refusal to pay that portion of the Virginia inheritance tax assessed against the currency in question, the argument was advanced that bonds of the United States payable to bearer and certificates of indebtedness of the United States took on the qualities of physical property and lost their character as choses in action. This Court struck down that argument and held that such items were at most choses in action and intangibles. 277 U. S. at pages 14 and 17.

In the *Blodgett* case, *supra*, the total amount of money involved was Two Hundred Eighty-seven and forty-seven

One Hundredths ($287.47) Dollars in "bank notes *and* coin" in a safe deposit box (italics supplied). This Court there held the money to be tangible property. In the instant case no coin is involved, all of the money in the safe deposit box being in currency. It is submitted that the currency in question in this case is more closely analogous for tax purposes to the bearer bonds issued by the United States declared to be intangible personal property in *Blodgett* v. *Silberman; supra*, than to the small amount of mixed coin and currency declared therein to be tangible property.

Respondent urges that *Pearson v. McGraw*, 308 U. S. 313, 84 L. Ed. 293, 60 S. Ct. 211, decided in 1939, expresses the better view and is dispositive of the questions presented by the Petitioner. In that case a resident and domiciliary of Oregon had directed an Illinois trust company to liquidate certain of his securities held by it under an agency agreement and to purchase, as his agent, Four Hundred Fifty Thousand ($450,000.00) Dollars of federal revenue notes and hold them for him. This the trust company did some six months before the death of its principal, the Oregon resident. A few days after the purchase of the notes, Mr. Hayes, the principal, executed a trust agreement, designating the Illinois trust company as trustee, and ordering it to transfer the federal reserve notes to the trust, which was for the benefit of certain designated relatives and which was irrevocable. From time to time thereafter, the trust company, as trustee, purchased bonds and other personal property for the account of the trust.

Upon the death of the principal-trustor in Oregon, that State assessed a succession or inheritance tax against the value of the federal reserve notes, on the ground that it had jurisdiction so to do under its statute similar in substance to the Virginia statute in the instant case. The majority of this Court, speaking through Mr. Justice Douglas, upheld the imposition of the tax on the ground that:

"* * * the various steps in the series must be considered as constituting but one integrated and indivisible transaction—a transfer by decedent of intangibles in contemplation of death." *Pearson* v. *McGraw*, 308 U. S. at page 317, 84 L. Ed. at page 296.

This Court went on to say that that being the case, it need not consider the nature of federal reserve notes. But Mr. Justice Stone wrote a concurring opinion and went directly to the question of whether Oregon could lay an inheritance or transfer tax on the value of federal reserve notes located in Illinois. He was of the opinion that the majority had chosen to avoid the principal direct question in the case, even though it reached the correct result.

Mr. Justice Stone's opinion concludes (308 U. S. at page 320, 84 L. Ed. at page 297):

"If the state has by its statute undertaken to lay a tax on gifts of bank notes outside the state without more—and we are without jurisdiction if it has not—no purpose is served by saying to the state that it could have reached the same result by another route, which, under its laws does not appear to be open to it.

"As I am of opinion that there is nothing in the Constitution to compel a state to treat federal reserve notes for tax purposes, as chattels were treated in Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, 42 A. L. R. 316, and as no reason has been advanced, even in Blodgett v. Silberman, 277 U. S. 1, 18, 72 L. Ed. 749, 760, 48 S. Ct. 410, for a different view, cf. Baldwin v. Missouri, 281 U. S. 586, 591, 74 L. Ed. 1056, 1059, 60 S. Ct. 436, 72 A. L. R. 1303, the judgment should, I think, be reversed upon that ground rather than upon a theory of permissible legislation, of which apparently Oregon's tax laws do not avail.

"Mr. Justice Frankfurter agrees with my views as to Oregon's power to tax these federal reserve notes.

but is of opinion that the record sustains the ground taken in the Court's opinion."

Both of the principal cases cited in the petition and in the brief, *Blodgett* v. *Silberman*, *supra*, on the one hand and *Pearson* v. *McGraw*, *supra*, on the other, express and adhere to the general rule that the sovereign power of the state extends over intangibles of a domiciled resident even though, at the time a death transfer or succession tax is sought to be levied on such intangibles, they may be located in another state. The opinion of this Court in *Curry* v. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339, 59 S. Ct. 900, 123 A. L. R. 162, points up the basic theory of "control over the person at the place of his domicile and his duty there."

CONCLUSION

In light of the foregoing, it is respectfully submitted that the judgment of the Circuit Court of Arlington County, Virginia, entered on June 29, 1959, is plainly right; that assessment and collection of the balance of inheritance tax due to the Commonwealth of Virginia does not deprive Petitioner of his property without due process of law in contravention of the Fourteenth Amendment; and that the writ of certiorari prayed for should be denied.

Respectfully submitted,

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